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No. 87-

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

SAIPAIA, ENE
Private First Class,
United States Marine Corps,

Petitioner,

v.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

JAMES J. QUIGLEY
Lieutenant Commander
JAGC, U.S. Navy
Counsel of Record

RICHARD E. OUELLETTE
Lieutenant Colonel
U.S. Marine Corps

ROBERT J. SMITH
Lieutenant Commander
JAGC, U.S. Navy
Appellate Defense Counsel

Navy—Marine Corps
Appellate Review Activity
Washington Navy Yard
Washington, D.C. 20374
(202) 433-2297

August 1987

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QUESTION PRESENTED

WHETHER PETITIONER WAS DENIED HIS SIXTH AMENDMENT RIGHT TO CONFRONTATION BECAUSE HIS COUNSEL WAS PROHIBITED FROM CROSS-EXAMINING A SEXUAL ASSAULT VICTIM ABOUT HER PAST SEXUAL BEHAVIOR, WHEN INEXTRICABLY INTERTWINED WITH HER PAST SEXUAL BEHAVIOR WAS A MENTAL ILLNESS A SYMPTOM OF WHICH WAS A FEELING OF ENJOYMENT IN HUMILIATING AND DESTROYING MEN?

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v.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

Private First Class Ene Saipaia, U.S. Marine Corps, respectfully petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Military Appeals in this case.

OPINIONS BELOW

The opinion of the United States Court of Military Appeals (App. A) is reported at 24 M.J. 172 (C.M.A. 1987). The opinion of the United States Navy-Marine Corps Court of Military Review (App. B) is unreported.

JURISDICTION

The judgment of the United States Court of Military Appeals was entered on July 6, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. § 1259(3).

CONSTITUTIONAL PROVISIONS INVOLVED

The Constitution of the United States provides:

> AMENDMENT VI: In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

OTHER PROVISIONS INVOLVED

Rule 412 of the Military Rules of Evidence provides:

> (a) Notwithstanding any other provision of these rules or this Manual, in a case in which a person is accused of a unconsensual sexual offense, reputation or opinion evidence of the past sexual behavior of an alleged victim of such nonconsensual sexual offense is not admissible.
>
> (b) Notwithstanding any other provision of these rules or this Manual, in a case in which

a person is accused of a nonconsensual sexual offense, evidence of a victim's past sexual behavior other than reputation or opinion evidence is also not admissible, unless such evidence other than reputation or opinion evidence is -

(1) admitted in accordance with subdivisions (c)(1) and (c)(2) and is constitutionally required to be admitted; or

(2) admitted in accordance with subdivision (c) and is evidence of -

(A) past sexual behavior with persons other than the accused, offered by the accused upon the issue of whether the accused was or was not, with respect to the alleged victim, the source of semen or injury; or

(B) past sexual behavior with the accused and is offered by the accused upon the issue of whether the alleged victim consented to the sexual behavior with respect to which the nonconsensual sexual offense is alleged.

(c)(1) If the person accused of committing a nonconsensual sexual offense intends to offer under subdivision (b) evidence of specific instances of the alleged victim's past sexual behavior, the accused shall serve notice thereof on the military judge and the trial counsel.

(2) The notice described in paragraph (1) shall be accompanied by an offer of proof. If the military judge determines that the offer of proof contains evidence described in sub-

division (b), the military judge shall conduct a hearing, which may be closed, to determine if such evidence is admissible. At such hearings the parties may call witnesses, including the alleged victim, and offer relevant evidence. In a case before a court-martial composed of a military judge and members, the military judge shall conduct such hearings outside the presence of the members pursuant to Article 39(a).

(3) If the military judge determines on the basis of the hearing described in paragraph (2) that the evidence which the accused seeks to offer is relevant and that the probative value of such evidence outweighs the danger of unfair prejudice, such evidence shall be admissible in the trial to the extent an order made by the military judge specifies evidence which may be offered and areas with respect to which the alleged victim may be examined or cross-examined.

(d) For purposes of this rule, the term "past sexual behavior" means sexual behavior other than the sexual behavior with respect to which a nonconsensual sexual offense is alleged.

(e) a "nonconsensual sexual offense" is a sexual offense in which consent by the victim is an affirmative defense or in which the lack of consent is an element of the offense. This term includes rape, forcible sodomy, assault with intent to commit rape or forcible sodomy, indecent assault, and attempt to commit such offenses.

Rule 608 of the Military Rules of Evidence provides:

> (a) *Opinion and reputation evidence of character.* The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.
>
> (b) *Specific instances of conduct.* Specific instances of conduct of a witness, for the purpose of attacking or supporting the credibility of the witness, other than conviction of crime as provided in Mil. R. Evid. 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the military judge, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning character of the witness for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified. The giving of testimony, whether by an accused or by another witness, does not operate as a waiver of the privilege against self-incrimination when examined with respect to matters which relate only to credibility.
>
> (c) *Evidence of bias.* Bias, prejudice, or any motive to misrepresent may be shown to im-

peach the witness either by examination of the witness or by evidence otherwise adduced.

STATEMENT OF THE CASE

Pursuant to his authority under the Uniform Code of Military Justice (UCMJ), the Commanding General, 1st Marine Amphibious Brigade, Marine Corps Air Station, Kaneohe Bay, Hawaii, convened a general court-martial to hear the case against petitioner. Petitioner was charged with rape and forcible sodomy, in violation respectively of Articles 120 and 125, UCMJ, 10 U.S.C. §§ 920 and 925 (1982).

At trial, petitioner filed a Notice of Intent pursuant to Military Rule of Evidence 412(c)(1) seeking to question the alleged victim, Irene Ricks, about certain aspects of her sexual history. Specifically, petitioner wished to cross-examine Irene Ricks about the fact that she had been a prostitute since the age of fourteen, that she had had sexual relations with hundreds of men, and that she had received tens of thousands of dollars in cash and gifts from men in return for these sexual acts. (R. at 72). Irene Ricks had so testified during the preliminary hearing, the Article 32 Investigation conducted pursuant to Article 32, UCMJ, 10 U.S.C. § 832 (1982). (R. of Article 32 Investigation at 221-240). Petitioner alleged that Irene Ricks was a borderline psychotic with an hysterical personality, who enjoyed humiliating and destroying men and whose sole means of expression was sexual. Petitioner contended that this constituted a bias against men, thus a motive, albeit subconscious, to fabricate her claim of rape and sodomy by appellant. The military judge denied petitioner's request to cross-examine Irene Ricks on these matters.

Irene Ricks first reported the sexual assault on October 26, 1981, ten days after it had allegedly occurred. She said a man approached her as she was opening the door of her car on the night of October 16, forced her into his own car, and drove her to a nearby beach where he raped and committed forcible oral sodomy on her.

Irene Ricks was eventually questioned by agents of the Naval Investigative Service (NIS). She identified petitioner from a series of photographs shown to her by one of the agents, and again identified him in a live lineup.

Petitioner called as a witness Dr. Kent Jordan, a psychiatrist who had treated Irene Ricks during a total of 24 sessions between March 5 and May 21, 1980. Dr. Jordan testified that Irene Ricks suffered from a borderline psychosis, an hysterical personality and a sociopathic personality.

The military judge had earlier ruled the defense psychiatrists could testify about Irene Ricks' sexual history to the extent necessary to explain their diagnoses. To that end, Dr. Jordan testified that Irene Ricks had been a prostitute since the age of nine (she was 26 at the time of trial) and had used this occupation to gain control over men, to obtain large sums of money from them, and "she somewhat delighted, and took pleasure out of humiliating men, hurting men, debasing men, and ruining them." (R. at 463). He also testified she was periodically out of touch with reality and that she suffered from paranoid delusions, particularly at night. As a result of her mental illness, according to Dr. Jordan, Irene Ricks frequently told lies without regard to the harm caused by them. What was significant to Dr. Jordan was not

simply that Irene Ricks had been a prostitute, but that she was the kind of prostitute who wanted to hurt, humiliate, and ruin men. (R. at 464).

The other expert witness called by petitioner was Dr. Krishna Kumar, a psychiatrist from Kaneohe, Hawaii, who had treated Irene Ricks on three occasions in January 1981, approximately ten months before these alleged offenses. He diagnosed her major mental illness as hysterical neurosis. Dr. Kumar testified Irene Ricks was not out of contact with reality during her sessions with him, although she did exaggerate the extent of her earlier psychiatric treatment by Dr. Jordan.

In rebuttal the Government called Dr. Gregory Melieste, a psychiatrist who saw Irene Ricks once, earlier the day she reported the rape, October 26, 1981. He saw no indication she was out of contact with reality. She did not mention the alleged sexual assault during their session, but did call him back later that day and mentioned it then.

In his closing argument to the members of the court-martial panel, the trial counsel (prosecutor) argued that Dr. Jordan's testimony, about the vast sums of money Irene Ricks bilked out of men, was incredible. In essence, he argued it was unbelievable that Irene Ricks had said to Dr. Jordan some of the things about her past Dr. Jordan claimed she had.

The Navy-Marine Corps Court of Military Review ruled that the prohibited cross-examination concerned irrelevant matters and in any event petitioner was not prejudiced because he was allowed to introduce the same matters through the testimony of Dr. Jordan.

The Court of Military Appeals granted review on this issue:

> WHETHER THE MILITARY JUDGE ERRED BY DENYING APPELLANT THE OPPORTUNITY TO CROSS-EXAMINE THE ALLEGED VICTIM ON HER PAST SEXUAL CONDUCT?

In its opinion the Court of Military Appeals upheld the military judge's ruling that prohibited cross-examination of Irene Ricks on her sexual history. Speaking for the Court, Chief Judge Everett indicated that direct evidence of Irene Ricks' sexual history was irrelevant to petitioner's two main theories, that no sexual assault had occurred or, if one had, petitioner was not the perpetrator. Chief Judge Everett noted that some of the evidence about Irene Ricks' history as a prostitute, which the defense sought to admit through cross-examination of her, was admitted through other means, mainly the testimony of Dr. Jordan.

REASONS FOR GRANTING THE WRIT

The Sixth Amendment guarantees the right of a defendant to confront the witnesses against him. The main purpose of this guarantee is to provide the defendant the opportunity of cross-examination. *Davis v. Alaska,* 415 U.S. 308 (1974).

Petitioner sought to cross-examine Irene Ricks about her bias and motive to lie, that she had a lengthy history of prostitution that was inextricably intertwined with her mental illnesses. Specifically, petitioner sought to show through cross-examination that she had used her occupation as a prostitute to destroy men, with the resulting implication that she,

subconsciously, was using this sexual assault complaint to destroy petitioner.

Military Rule of Evidence 412, the military services' version of the "rape shield" law, generally bars evidence of the sexual history of a sexual assault victim. Subsection (b)(1) makes an exception when the evidence is "constitutionally required to be admitted." Rule 412 is primarily a rule of relevance, "specifically concerned with the relevance of the victim's sexual past in a trial for a sex offense." *United States v. Saipaia,* 24 M.J. 172, 175 (C.M.A. 1987).

The bias or motive of a witness is "always relevant as discrediting the witness and affecting the weight of his testimony." *Davis v. Alaska, supra* at 316; *see also* Rule 608 of the Military Rules of Evidence. Trial judges retain wide latitude to impose reasonable limits on such cross-examination. *Delaware v. Van Arsdall,* 475 U.S. 673 (1986). If denial of the cross-examination is constitutionally improper, a reviewing court must be able to say the error was harmless beyond a reasonable doubt. *Id.*

Petitioner's defense rested on a showing that Irene Ricks was an incredible witness. With a total lack of medical evidence to corroborate the alleged sexual assault, her credibility was the only issue. More specifically, petitioner wanted to show that because of her mental illnesses, Irene Ricks was biased against men and used sexual means to gain revenge. Denied the opportunity to cross-examine her on her history as a prostitute, and the way she used that occupation to achieve her goal of hurting men, petitioner was forced to rely on the testimony of Dr. Jordan, a psychiatrist who had treated her. This, simply stated, was an inadequate substitute for the opportunity to

effectively cross-examine the government's principle witness. Indeed, the trial counsel argued that Dr. Jordan was himself lying about the statements Irene Ricks made to him. Given the opportunity to obtain the same testimony from the mouth of Irene Ricks, petitioner's defense would have been greatly enhanced.

In *Delaware v. Van Arsdall,* 475 U.S. 673 (1986), this Court held that the constitutionally improper denial of cross-examination for bias is, like other Confrontation Clause errors, subject to *Chapman v. California,* 386 U.S. 18 (1967), harmless-error analysis. The question is whether, if the damaging potential of the cross-examination had been fully realized, the reviewing court may nonetheless say the error was harmless beyond a reasonable doubt. *Delaware v. Van Arsdall,* 475 U.S. at 684. Factors to consider in making this determination include the importance of the witness' testimony, whether the testimony was cumulative, the extent to which the testimony is corroborated or contradicted by other evidence, the extent of cross-examination otherwise permitted, and the overall strength of the prosecution's case. *Id.*

Considering these factors, denial of the cross-examination of Irene Ricks on her sexual history was not harmless. Irene Ricks' testimony was absolutely necessary to the government's case. Indeed, she *was* the case. Her testimony was not cumulative. In some ways her testimony was corroborated, but in many other ways her testimony was inconsistent with other evidence. For example, she claimed she saw petitioner outside her home after the assault at a time when petitioner's witnesses placed him elsewhere. While it

is true the scope of cross-examination was not significantly hindered beyond that previously mentioned, the prosecution's case was not strong. Irene Ricks either had to be believed or petitioner would be acquitted.

By impermissibly denying petitioner the right to show Irene Ricks' bias and motive to lie through cross-examination of her, the military judge deprived petitioner of the best evidence available on his defense. He forced petitioner to rely on arguably incredible evidence when credible evidence was available. The members of the court-martial panel could not make an informed judgment on the weight to be placed on Irene Ricks' testimony.

CONCLUSION

For the reasons discussed above, the petition for certiorari should be granted.

Respectfully submitted,

James J. Quigley
Lieutenant Commander
JAGC, U.S. Navy
Counsel of Record

Richard E. Ouellette
Lieutenant Colonel
U.S. Marine Corps

Robert J. Smith
Lieutenant Commander
JAGC, U.S. Navy
Appellate Defense Counsel

Navy-Marine Corps
Appellate Review Activity
Washington Navy Yard
Washington, D.C. 20374
(202) 433-2297

August, 1987

APPENDIX

APPENDIX A

U.S. Court of Military Appeals.

No. 47,178.
NMCM 82 4371.

UNITED STATES,

Appellee,

v.

Ene SAIPAIA, Private First Class U.S. Marine Corps,

Appellant.

July 6, 1987

Accused, private first class, United States Marine Corps, was convicted by general court-martial of rape and forcible sodomy. The United States Navy-Marine Corps Court of Military Review affirmed. Review was granted. The United States Court of Military Appeals, Everett, C.J., held that direct evidence of victim's past sexual activity was not relevant to resolution of issues in case and, thus, was properly excluded.

Affirmed.

Sullivan, J., concurred in result.

For Appellant: *Lieutenant Commander William A. Decicco, JAGC, USN* and *Lieutenant Lois B. Agronick, JAGC, USNR* (on brief); *Lieutenant Commander Georgia L. Winstead, JAGC, USNR.*

For Appellee: Captain W.J. Hughes, JAGC, USN and Lieutenant Steven P. Benson, JAGC, USNR (on brief).

Opinion of the Court

EVERETT, Chief Judge:

I

At appellant's general court-martial on charges of rape and forcible sodomy,* defense counsel timely filed a "Notice of Intent" to introduce evidence of the victim's past sexual experience. *See* Mil. R. Evid. 412(c)(1), Manual for Courts-Martial, United States, 1969 (Revised edition). The defense "intent" in this regard went to evidence of a large number of acts of prostitution and to expert testimony by psychiatrists who had seen the victim and who would address the direct relationship between her sexual past and her psychotic illness, as well as the direct relationship between her sexual history and the "fantasy" of her rape by appellant. The defense motion explained:

> The defense feels that Mrs. Ricks' borderline psychosis, with its underlying basis in her sexual history,constitutes a bias, prejudice and motive to misrepresent . . . Sexuality and sexual matters constitute Irene RICKS' single and most effective means of expressing herself, of communicating with others. Her cry of "rape" (not made . . . until 26 October 1981) is a cry for attention, not a statement of the occurrence of an actual event. It is the manifestation of a hysterical personality and a borderline psychotic condition. . . . The defense should be given the opportunity to demonstrate Mrs. RICKS' possibly subconscious, and thus, all the more insidious, motive to misrepresent —her sexually based borderline psychosis and hysterical personality condition.

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* Despite his pleas, appellant was convicted as charged, in violation of Articles 120 and 125, Uniform Code Military Justice, 10 U.S.C. §§ 920 and 925, respectively. Therefor, the court-martial sentenced him to a dishonorable discharge, confinement for 20 years, total forfeitures, and reduction to the lowest enlisted grade. The convening authority approved the trial results, and the Court of Military Review affirmed in a divided opinion. This Court granted review of an issue questioning "whether the military judge erred by denying appellant the opportunity to cross-examine the alleged victim on her past sexual conduct."

Predictably, trial counsel resisted the motion, citing Mil.R.Evid. 412(b).

Finally, the military judge ruled as follows:

> I have ruled that the doctors, three doctors may testify. Further, I will permit the doctors to testify that in effect the alleged victim has . . . because of her focus upon or preoccupation with or concern with sexual matters, is therefore likely to make any false complaint or to lodge a false complaint and to do so about a sexual matter. In effect, excluding specific reference to the proffered areas of prostitution, number of contacts, and receipt of gifts. That ruling presumes that that opinion is itself admissible and, further, that the doctors find it necessary to make reference to that in support of their opinion. With regard to relation of specific acts by related . . . related by the doctors, I will sustain 412 objection to that testimony at this time and, likewise, I will preclude cross-examination of the victim concerning those same matters. At this juncture it is my view that those specific acts, whether testified to by the doctors or by the victim, are not relevant and that even if marginally relevant that the probative value of that evidence is far outweighted [sic] by the danger of unfair prejudice and confusion of the members. That constitutes my ruling.

Consistent with this ruling, the military judge permitted neither cross-examination of Mrs. Ricks nor extrinsic evidence concerning her sexual history. During cross-examination, however, the defense did attempt to probe the victim's past sexual history after the Government, during direct examination, had elicited testimony about her rape by an uncle at age 8 or 9. When trial counsel again objected on the basis of Mil. R. Evid. 412, defense counsel responded that he believed trial counsel had opened the door to this area. Trial counsel, in turn, explained that it had been his intent to explain Mrs. Ricks' delay in re-

porting the instant rape by the effect of her childhood experience. The defense reiterated:

> It seems that the government was trying to, at least, infer to the members that Mrs. RICKS' having been raped once before in her life, having gone to her mother, and, in effect, been criticized by her mother for having been involved in this, would be leary of reporting a second rape. And that's to explain why the ten-day delay in this case. We also feel that evidence of her past sexual history shows that she is quite familiar with sex and sexual matters. It is rather mundane for her and that that would not be a reason for the members to infer that she delayed reporting the rape. That's another reason we thought we should be allowed to go into her past sexual history.

MJ: My ruling stands. I have considered the scope of the government's direct examination and the question asked. It is not presently within the proper scope of cross-examination.

The military judge did permit, though—as he indicted he would—the expert psychiatric testimony offered by the defense. First, Dr. Kent Jordan, a board-certified psychiatrist in California, testified on the basis of his twenty-four sessions with the victim over a 2-1/2-month period, each session lasting from an hour to three hours. His diagnosis of Mrs. Ricks was tripartite: sociopathic personality, histrionic personality disorder, and borderline psychosis. Dr. Jordan elaborated on each as follows:

> [A sociopath is] a person that has very little or no conscience, no compunction to commit immoral or asocial acts, almost no concern for other . . . the welfare of other human beings, a tendency to manipulate other people to obtain one's own advantage at the expense of other people. That's sociopathic. A hysterical or histrionic personality is . . . they're usually women and they are dramatic. They tend t. exaggerate, distort

> reality to some extent but not grossly, typically, and they are very seductive.
>
> * * * * * *
>
> A psychotic is an individual that is diagnosed as psychotic and they're out of contact with reality the majority of their waking hours. But borderline psychosis is somebody who intermittently decompensates into a state of being out of contact with reality, with stress.

Important to the defense, Dr. Jordan was allowed to amplify his diagnosis of Mrs. Ricks regarding the bases therefor. His conclusion that she is a sociopathic personality was based on her history of prostitution and her history of extracting a great deal of money from men without regard for their welfare. Indeed, "she somewhat delighted, and took pleasure out of humiliating men, hurting men, debasing men, and ruining them." He also stated, in this connection, that he had verified Mrs. Ricks' relationship with three of the men she had named and that she was wanted on charges in numerous states, about which she was unconcerned except for the possibility of getting caught.

As to Dr. Jordan's diagnosis that Mrs. Ricks was a histrionic personality, he testified that she had been seductive in both her speech and her mannerisms and that she told stories in order to center the attention of others on herself. In his opinion, she felt quite strongly this need for attention.

Finally, the basis for Dr. Jordan's diagnosis of Mrs. Ricks' borderline psychosis was his observation of her regression "to an infantile state in which she had delusions that she was a" baby who needed to be held and carried and who wanted to suck someone's breast. Dr. Jordan revealed that he had observed this change on about ten different occasions during their sessions. Further, Dr. Jordan testified:

> [S]he would become panic-stricken over fears that the people all around her were out to get her. That telephone calls that her husband would monitor and listen to that he said were innocent, she would interpret as being threats to her life. And that, when strangers on the street would look, she would think that they were some agents of men that she had done . . . that she had gotten money out of and hurt. That they were following her. That they were going to get her. Or that the police were trailing her everywhere she went.

Dr. Jordan added that such a person's tendency to lose contact with reality increased at night.

The second psychiatrist to testify was Dr. Krishna Kumar, who saw Mrs. Ricks three times, for about an hour and a half each time. He stated that he had formulated a diagnostic impression of Mrs. Ricks resting between hysterical personality with borderline psychosis or hysterical neurosis. He submitted that "[s]he had demonstrated psychopathology" in every important diagnostic category, including "feelings and emotions; . . . thought content and thought process; . . . impulse and impulse control; . . . needs; . . . perceptions; . . . self-concept; . . . behavior; . . . and interpersonal relationships." Moreover, Dr. Kumar recited occasions when Mrs. Ricks had lied to him; and, when faced with the falsehoods, she had denied them and, instead, had insisted that they were true.

II

Notwithstanding the general rule against receiving evidence of the past sexual behavior of the victim of a nonconsensual sexual offense, *see* Mil. R.Evid. 412(a) and (b), this evidence is admissible when "constitutionally required." Mil.R.Evid. 412(b); *United States v. Dorsey,* 16 M.J. 1 (C.M.A. 1983). *See United States v. Hollimon,* 16 M.J. 164 (C.M.A. 1983); *United States v. Colon-Angueira,*

16 M.J. 20 (C.M.A. 1983); and *United States v. Elvine,* 16 M.J. 14 (C.M.A. 1983). Primarily, Mil.R.Evid. 412 is a rule of relevance, specifically concerned with the relevance of the victim's sexual past in a trial for a sex offense. *See United States v. Colon-Angueira, supra* at 29 (Everett, C.J., concurring).

Although this court-martial preceded our cited decisions in this field, the military judge correctly walked the line of relevance as to the proffered evidence. *See generally* Mil.R.Evid. 402 ("All relevant evidence is admissible . . . Evidence which is not relevant is not admissible"). The defense theory was that Mrs. Ricks was preoccupied with sexual activity and manipulation of men and that this contributed to psychotic disorders, manifested by a false sexual accusation against appellant. The military judge allowed the defense to support this theory by offering expert testimony about Mrs. Ricks' psychological makeup. Moreover, the experts were permitted to explain the reasons for their opinions about her various disorders. In doing this, the witnesses referred to some of the same matters as to which the defense counsel wished to cross-examine Mrs. Ricks. For example, Dr. Jordan made clear that her history of prostitution was a significant factor in reaching his diagnosis.

Although appellant did not testify himself, the defense vigorously contested the claim that Mrs. Ricks had been raped and sodomized by anyone. We do not perceive how the development of this defense was hindered by the military judge's evidentiary rulings. Moreover, the defense urged that, if an offense had occurred, appellant was not the perpetrator: He had been misidentified by Mrs. Ricks. Certainly, as to this theory, the defense could not have been affected by the exclusion of evidence under Rule 412. Her activity as a prostitute would not tend to show why she had accused one person, rather than another, of committing crimes against her.

If Saipaia had conceded that he had had sexual intercourse with Mrs. Ricks but had claimed that it was consensual and that she had accused him of rape because he had failed to pay her price, then her prior activity as a prostitute would have been especially relevant. However, no such contention was made by the defense; and, indeed, it would have been at odds with the argument that appellant had been misidentified by her.

The defense seems to have had in mind that, if Mrs. Ricks had been cross-examined about her sexual past, her answers and her demeanor while responding would have demonstrated that she was mentally deranged. Apparently, they anticipated that her ego would collapse if she were questioned in this manner. Counsel is entitled to reasonable latitude in cross-examining a witness, so that the factfinder will have a better basis for evaluating the witness' ability to observe, remember, and describe events and her credibility. However, we doubt that a defense counsel should be allowed to embarrass or humiliate a witness merely so that the factfinder may observe how the witness reacts to such stress. Thus, in our view, the cross-examination of Mrs. Ricks about intimate details of her sex life cannot be justified as a necessary test of her trustworthiness.

For these reasons—and especially in view of the large amount of other favorable defense evidence on the same topic—we conclude that the direct evidence of Mrs. Ricks' past sexual activity was not relevant to the resolution of the issues in this case: It simply was too remote.

III

The decision of the United States Navy-Marine Corps Court of Military Review is affirmed.

Judge COX concurs.

Judge SULLIVAN concurs in the result.

APPENDIX B

DEPARTMENT OF THE NAVY
OFFICE OF THE JUDGE ADVOCATE GENERAL
200 STOVALL STREET
ALEXANDRIA, VA 22332

IN THE U.S. NAVY-MARINE CORPS COURT OF MILITARY REVIEW
BEFORE
K. L. ABERNATHY PHILIP C. BARR M. G. MALONE

UNITED STATES
v.
ENE SAIPAIA, 546 43 7816, Private First Class (E-2), U.S. Marine Corps
NMCM 82 4371 DECIDED 22 June 1983
Sentence adjudged 29 March 1982. Review pursuant to Article 66(c), UCMJ of General Court-Martial convened by Commanding General, 1st Marine Brigade, FMF, Marine Corps Air Station, Kaneohe Bay, Oahu, Hawaii.

LCDR Georgia L. Winstead, JAGC, USNR, Appellate Defense Counsel; LT Stephen R. Cochell, JAGC, USNR, Appellate Defense Counsel; LT Steven P. Benson, JAGC, USNR, Appellate Government Counsel; LT Sandra R. Ganus, JAGC, USNR, Appellate Government Counsel

PER CURIAM:

Contrary to his pleas, appellant was convicted at a general court-martial composed of officer members of one specification of rape in violation of Article 120, Uniform Code of Military Justice (UCMJ), and one specification of sodomy in violation of Article 125, UCMJ. Appellant was sentenced to confinement at hard labor for twenty years, forfeiture of all pay and allowances, reduction to E-1, and to be discharged from the service with a dishonorable discharge. The convening authority approved the sentence as awarded.

I

Appellant contends that he was not convicted by proof beyond a reasonable doubt. Appellant asserts that the testimony of Mrs. R. was both untruthful and inherently implausible and, as such, cannot be used as the basis for his conviction. We disagree with this contention. Despite fierce defense attack, Mrs. R consistently maintained her story through two separate Article 32, UCMJ, Pre-trial Investigations, as well as the trial itself. Although Mrs. R's background and personality are somewhat bizarre, and although the pieces of her story do not always fit into a nice and neat picture, our review of the record evinces no reason to overturn the judgment of the members, who were in a unique position to evaluate her credibility and assess the plausibility of her story. After observing Mrs. R as a witness, as well as hearing and digesting the testimony of all the other witnesses, including the psychiatrists, the members were convinced beyond a reasonable doubt that Mrs. R's story, which was assailed but never rebutted, was not fabricated. The evidence of record is sufficient to support that judgment.

II

Appellant contends that the trial judge erred by denying him the opportunity to cross-examine Mrs. R on her past sexual history. Appellant's position is that this evidence is "constitutionally required to be admitted." *Davis v. Alaska,* 415 U.S. 308 (1974); Mil. R. Evid. 412(b) (1). We disagree. The Sixth Amendment right to confrontation and the Fifth Amendment right to due process of law require only that the accused be permitted to introduce all relevant and admissible evidence. *United States v. Kasto,* 584 F.2d 268, 272 (8th Cir. 1978), *cert. denied* 440 U.S. 930 (1979). The military judge ruled that Mrs. R's past sexual history was indeed relevant, although not on her cross-examination, but only to the diagnosis of Dr. Jordan. By allowing past

specific sexual acts into evidence through the testimony of Dr. Jordan, the military judge fully allowed the defense to develop its theory of the case that this was a false complaint due to Mrs. R's psychiatric disorders based in part upon her preoccupation with sexual matters. To have also let this evidence come in through the cross-examination of Mrs. R, however, would have been to controvert the purpose of Mil. R. Evid 412. Rule 412 was designed to protect and shield the victim of a sexual assault from harassment and embarrassment due to the presentation of evidence of past sexual behavior that has little probative value but great potential for prejudice. *Manual for Courts-Martial, United States, 1969 (Rev.)* (MCM). App. 18 at A18-65 (1980) (drafter's analysis of Rule 412). To have cross-examined Mrs. R on her unchastity would not only have been irrelevant to the issue of her veracity, but it also would have embarrassed her and distracted the members. *See United States v. Dorsey,* 14 M.J. 536 (ACMR 1982); *United States v. Holliman,* 12 M.J. 791 (ACMR 1982). A cross-examination of her past sexual history would have neither proved nor disproved the events of the night of 16 October 1981. What was relevant, however, was Mrs. R's motivation, if any, to fabricate, and in this area the trial judge did not put any prohibitions on cross-examination. Defense counsel was free to explore Mrs. R's biases, especially her dislike for men and her willingness to manipulate men through sexual matters. Therefore, since Rule 412 was invoked to exclude only irrelevant evidence, appellant was not denied his constitutional right to cross-examine Mrs. R. *See United States v. Ferguson,* 14 MJ 840 (ACMR 1982).

III

The remaining assignments of error do not require lengthy discussion by us. We find no abuse of discretion on the part of the military judge in failing to compel the testimony of Dr. Buckout, an expert in social and percep-

tual factors in eyewitness identification. The military judge carefully weighed the value of the tendered expert testimony against its prejudicial effect, and he properly concluded the latter outweighed the former. *See United States v. Hicks,* 7 MJ 561 (ACMR 1979), *pet denied* 7 M.J. 249 (CMA 1979). We have examined the photographs shown to Mrs. R by NIS agents during the photographic line-up, and we have carefully reviewed NIS actions in conducting the photographic line-up, the automobile identification, and the live line-up, but we cannot, appellant's assertions to the contrary notwithstanding, find even so much as a hint of suggestiveness.

We specifically reject appellant's contention that in questioning Mrs. R about being raped by her uncle, the government opened the door to defense cross-examination on her entire past sexual history. Mil. R. Evid. 412; 611(b). It is well-established that rape and sodomy are not multiplicious for sentencing. *United States v. Rose,* 6 M.J. 754 (NMCMR 1978), *pet. denied* 7 M.J. 56 (CMA 1979). Due to the ample expert testimony of record of Mrs. R's mental condition, the military judge did not abuse his discretion in refusing a defense requested continuance for another psychiatric examination of Mrs. R. *United States v. Curtis,* 520 F.2d 1300 (1st Cir. 1975); *United States v. Jenkins,* 442 F.2d 429 (5th Cir. 1971). Also, the military judge did not abuse his discretion in refusing to instruct the members that the appellant could not be convicted on the uncorroborated testimony of Mrs. R, if her testimony was found by the members to be self-contradictory, uncertain, or improbable. We decline to so characterize Mrs. R's testimony, and furthermore, we do not believe this instruction to be appropriate under the changes to Mil. R. Evid. 412 and the elimination of this provision in Paragraph 153(a) of the MCM. *See United States v. Deshotel,* 15 M.J. 787 (ACMR 1983); MCM, App. 18 at A18-66 (drafter's analysis of rule 412).

IV

Lastly, appellant asserts that a sentence which includes confinement at hard labor for twenty years is inappropriately severe. Military society, through the voice of the members, has expressed its "moral outrage" at appellant's crimes. We are reluctant to disturb the sense of justice of the community where the crime is committed, but are required to do so if the harshness of the sentence cries out for sentence equalization. Article 66(c), UCMJ; *United States v. Usry*, 9 M.J. 701 (NCMR 1980), *pet. denied* 9 M.J. 402 (CMA 1980). Our review of the record convinces us that the adjudged and approved sentence is altogether appropriate for these offenses and this offender. Accordingly, the findings and sentence as approved on review below are affirmed.

(SEE CONCURRING/DISSENTING OPINION
K. L. ABERNATHY, Senior Judge
/s/ Philip C. Barr
PHILIP C. BARR, Judge

Judge MALONE concurs.*

ABERNATHY, Senior Judge (concurring in part/dissenting in part):

I am convinced that the ends of justice would be adequately served by a sentence which includes a period of confinement of ten, vice twenty, years. Subject to this observation, I agree with the disposition of the case.

/s/ K. L. Abernathy
K. L. ABERNATHY

*Judge Michael G. Malone took final action in this case prior to his detachment from the Court on 14 June 1983.